



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO. E004 OF 2021**

**BETWEEN**

**MILLICENT ADHIAMBO ODHIAMBO.....APPELLANT**

**AND**

**KENNEDY OUMA OCHIENG.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Mbita Principal*

*Magistrate's PMCC No. 13 of 2020 by Hon. Japheth C. Bii –Senior Resident Magistrate).*

**JUDGMENT**

1. Millicent Adhiambo Odhiambo, the appellant herein was the plaintiff in Mbita Principal Magistrate's PMCC No. 13 of 2020. She had filed the suit claiming a refund of Kshs. 89,000/= after the respondent failed to deliver some tents. Judgment was entered against the appellant on grounds that she had rushed to court.

2. The appellant was aggrieved by the said judgment and filed this appeal. She was represented by the firm of H. Obach & Partners Advocates. She raised six grounds of appeal as follows:

a) That the learned trial magistrate erred in law and in fact by completely misinterpreting the provisions of the contract as regards the duties and responsibilities of the respondent to make the appellant tents for commercial use being a 100 seater and 50 seater tents with a liner.

b) That the learned trial magistrate erred in law and in fact by failing to appreciate that the duty to make tents as in the contract between the appellant and the respondent was a statutory as well as contractual duty and that in all circumstances of the case the statutory duty and obligations prevailed.

c) That in finding that the appellant do bear costs of the suits, the learned trial magistrate misconceived and or misapprehended the tenor and or the meaning of the provisions of Section 27(1) of the Civil Procedures Act (Cap 21) laws of Kenya.

d) That the learned trial magistrate failed to cumulatively and or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and or features of the suit before him and thus arrived at an erroneous conclusion.

e) That the learned trial magistrate approached and or dealt with the evidence on record, in a slanted manner and thereby failed to appreciate the tenor of the evidence on record, including but not limited to purporting that the appellant ought to have cleared the balance to enable the respondent complete the contracted work.

f) That the learned trial magistrate exhibited actual and extreme bias in the suit by adopting a guillotine approach to this suit and others then to be decided by rendering "cut and paste judgment" to the detriment of the appellant. Consequently, the judgment of the learned trial magistrate is partially unfair, unjust and sanctions illegalities and abuse of the process of the honourable court.

3. The appeal was opposed by the respondent on the following grounds:

a) That the appellant was in breach of contract.

b) That the appellant rushed in filing the suit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The appellant and the respondent herein entered into an oral agreement for the respondent to make two commercial tents for the appellant. This was in August, 2019. What the parties did not agree on was the total amount payable. The two however were in agreement that the appellant had paid Kshs. 89,000/=.

6. Millicent Adhiambo Odhiambo, the appellant testified that she paid the first instalment of Kshs.60, 000/= on 30<sup>th</sup> August, 2019. She later paid Kshs. 29,000/=. The total amount was expected to be Kshs. 110,000/=.

7. The respondent in his written evidence statement, conceded that the tents were valued at Kshs. 110,000/=. This is contrary to his statement of defence where he pleaded that tents were valued at Kshs. 260,000/=.

8. Confronted with these two scenarios, the learned trial magistrate ought to have found that the respondent was not worth believing. I therefore make a finding that the total expected to be paid to the respondent was Kshs.110, 000/=.

9. The appellant further stated that on 9<sup>th</sup> January, 2020 after the respondent had failed to deliver the tents, the two verbally agreed that he was to refund her what she had paid not later than 12<sup>th</sup> January, 2020. This was not done. This was not challenged by the respondent. Since this averment was not challenged and I make a finding that this is what the parties had agreed on.

10. The appellant filed her suit on 19<sup>th</sup> February, 2020. Since the parties had entered into an agreement for the commercial tents in September, 2019 the appellant cannot be accused to have rushed to court. The decision by the learned trial magistrate cannot be allowed to stand. It left the appellant without redress and sought to enrich the respondent unfairly.

11. I therefore quash the judgment by the trial court and set aside any consequential orders. I substitute it with a judgment for the appellant in the following terms:

a) A refund of Kshs. 89,000/= with interest at court rates from the date of filing of the suit.

b) Costs both in the trial and in this court with interest at court rates.

Orders accordingly.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**